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8 RODERICK MAGGAY,
9 Plaintiff,
10 v.
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12 OFFICER MICKE, et al.,
13 Defendants.
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16 Case No. 21-cv-04994 BLF (PR)
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18

**ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION; INSTRUCTIONS TO
CLERK**

19 Plaintiff, a federal prisoner who is currently confined at the Federal Correctional
20 Institution at Herlong, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. §
21 1983 against several officers at the Santa Rita County Jail (“Jail”). Dkt. No. 1. The Court
22 dismissed the complaint with leave to amend for Plaintiff to correct several deficiencies.
23 Dkt. No. 11. The Court granted Plaintiff leave to file a second amended complaint after he
24 filed a “motion of clarification,” Dkt. No. 14, naming additional Defendants. Dkt. No. 25.
25 Plaintiff was advised that failure to respond in accordance with the order would result in
26 this action proceeding based on the cognizable claims in the amended complaint, as
discussed in the court’s initial screening order. Dkt. No. 14.

27 Plaintiff was granted three extensions of time to file a second amended complaint,
28 with the last order giving him twenty-eight days from the date the order is filed, i.e., by

1 December 20, 2022. Dkt. Nos. 27, 30, 35. The deadline has long since passed, and
2 Plaintiff has not responded. Accordingly, this matter shall proceed on the cognizable
3 claims from the amended complaint.

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5 DISCUSSION

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A. Standard of Review

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8 A federal court must conduct a preliminary screening in any case in which a
9 prisoner seeks redress from a governmental entity or officer or employee of a
10 governmental entity. *See 28 U.S.C. § 1915A(a)*. In its review, the court must identify any
11 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
12 upon which relief may be granted or seek monetary relief from a defendant who is immune
13 from such relief. *See id. § 1915A(b)(1),(2)*. Pro se pleadings must, however, be liberally
14 construed. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

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16 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
17 elements: (1) that a right secured by the Constitution or laws of the United States was
18 violated, and (2) that the alleged violation was committed by a person acting under the
color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

19

B. Plaintiff’s Claims

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21 The Court found the following cognizable claims in the amended complaint:

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23 ...Plaintiff’s allegations in the amended complaint are now sufficient to
24 state a cognizable excessive force claim against Officer Micke under the
Fourteenth Amendment. *See Graham v. Connor*, 490 U.S. 386, 395 n.10
(1989) (citing *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979)) (Due Process
Clause of the Fourteenth Amendment protects a post-arrangement pretrial
detainee from the use of excessive force that amounts to punishment).

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26 Furthermore, Plaintiff’s allegations are sufficient to state a failure to protect
claim against Officer [Perez].¹ *See Castro v. Cnty. of Los Angeles*, 833

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28 ¹ Plaintiff’s “motion of clarification” indicates that the proper Defendant should be Deputy Perez, rather than Officer Perry. Dkt. No. 24. Accordingly, Officer Perez’s name

1 F.3d 1060, 1068, 1070-71 (9th Cir. 2016) (en banc) (objective standard for
2 excessive force claims brought by pretrial detainees also applies to failure
3 to protect claims brought by pretrial detainees).

4 With respect to the unidentified Defendants who were also present and
5 allegedly failed to intervene, Plaintiff shall be given an opportunity through
6 discovery to identify the unknown defendants. *See Gillespie v. Civiletti*,
7 629 F.2d 637, 642 (9th Cir. 1980). Accordingly, once Defendants Micke
8 and [Perez] are served with this matter, Plaintiff must attempt to obtain the
9 name of unidentified Defendants through discovery (if he has not already
10 obtained that information through other means), and then move to add their
11 names and request that they be served. Plaintiff must provide the Court
12 with the names of these unidentified Defendants by the date scheduled in
13 this Order for any served Defendant to file a dispositive motion. Failure to
14 do so will result in the dismissal of those unidentified Defendants without
15 prejudice to Plaintiff filing a new action against them.

16 ...

17 Plaintiff claims that Officer Micke's excessive force constitutes adverse
18 action, and that he acted because Plaintiff was exercising his First
19 Amendment right (of free speech) in requesting medical attention under the
20 Fourteenth Amendment, which are "protected right[s]." *Id.* at 3. Plaintiff
21 claims being placed in an isolation cell effectively "chilled" his ability to
22 exercise his First Amendment right of free speech and such action had no
23 legitimate correctional goal. *Id.* Liberally construed, Plaintiff's allegations
24 are sufficient to state a retaliation claim against Officer Micke.

25 Dkt. No. 14 at 4, 6.

26 CONCLUSION

27 For the reasons state above, the Court orders as follows:

28 1. This action shall proceed with the following cognizable claims: (1) excessive
2 force claim against Officer Micke; (2) failure to protect claim against Officer Perez; and
3 (3) retaliation claim against Officer Micke.

4 The Clerk shall terminate "Officer Perry" as a Defendant from this action and
5 replace with the proper Defendant, "Deputy Perez."

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7 throughout the amended complaint shall be stricken and replaced with Deputy Perez.
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1 In the same time provided below for Defendants to file a motion for summary
2 judgment or other dispositive motion, *see infra* at paragraph 4, Plaintiff shall file a motion
3 to amend to add newly identified Defendants for his failure to protect claim and deliberate
4 indifference to medical needs claim. Dkt. No. 14 at 4-5. With respect to the medical
5 claims, Plaintiff must file a proposed amendment that contains specific allegations against
6 each named Defendant as discussed in the Court's screening order. *Id.* If Plaintiff needs
7 additional time, he must file a motion for an extension of time stating what efforts he has
8 made to obtain the information and why additional time is necessary.

9 2. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
10 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy
11 of the amended complaint, Dkt. No. 11, all attachments thereto, Dkt. No. 12, and a copy of
12 this order and Dkt. No. 14 upon **Defendant Officer Perez at the Alameda County Santa**
13 **Rita Jail (5325 Broder Blvd., Dublin, CA 94568).**

14 3. Defendants are cautioned that Rule 4 of the Federal Rules of Civil
15 Procedure requires them to cooperate in saving unnecessary costs of service of the
16 summons and the amended complaint. Pursuant to Rule 4, if Defendants, after being
17 notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the
18 summons, fail to do so, they will be required to bear the cost of such service unless good
19 cause shown for their failure to sign and return the waiver form. If service is waived, this
20 action will proceed as if Defendants had been served on the date that the waiver is filed,
21 except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file
22 an answer before **sixty (60) days** from the day on which the request for waiver was sent.
23 (This allows a longer time to respond than would be required if formal service of summons
24 is necessary.) Defendants are asked to read the statement set forth at the foot of the waiver
25 form that more completely describes the duties of the parties with regard to waiver of
26 service of the summons. If service is waived after the date provided in the Notice but
27 before Defendants have been personally served, the Answer shall be due sixty (60) days

1 from the date on which the request for waiver was sent or twenty (20) days from the date
2 the waiver form is filed, whichever is later.

3 4. No later than **ninety-one (91) days** from the date this order is filed,
4 Defendants shall file a motion for summary judgment or other dispositive motion with
5 respect to the claims in the amended complaint found to be cognizable above.

6 a. Any motion for summary judgment shall be supported by adequate
7 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
8 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
9 qualified immunity found, if material facts are in dispute. If any Defendant is of the
10 opinion that this case cannot be resolved by summary judgment, he shall so inform the
11 Court prior to the date the summary judgment motion is due.

12 b. **In the event Defendants file a motion for summary judgment, the
13 Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate
14 warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
15 *Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

16 5. Plaintiff's opposition to the dispositive motion shall be filed with the Court
17 no later than **twenty-eight (28) days** from the date Defendants' motion is filed.

18 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and
19 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment
20 must come forward with evidence showing triable issues of material fact on every essential
21 element of his claim). Plaintiff is cautioned that failure to file an opposition to
22 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to
23 the granting of the motion, and granting of judgment against Plaintiff without a trial. *See*
24 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18
25 F.3d 651, 653 (9th Cir. 1994).

26 6. Defendants *shall* file a reply brief no later than **fourteen (14) days** after
27 Plaintiff's opposition is filed.

1 7. The motion shall be deemed submitted as of the date the reply brief is due.

2 No hearing will be held on the motion unless the Court so orders at a later date.

3 8. Discovery may be taken in accordance with the Federal Rules of Civil
4 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
5 Rule 16-1 is required before the parties may conduct discovery.

6 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
7 court informed of any change of address and must comply with the court's orders in a
8 timely fashion. Failure to do so may result in the dismissal of this action for failure to
9 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

10 10. Extensions of time must be filed no later than the deadline sought to be
11 extended and must be accompanied by a showing of good cause.

12 **IT IS SO ORDERED.**

13 Dated: January 17, 2023


BETH LABSON FREEMAN
United States District Judge

Northern District of California